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August 4, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing
Date of Filing: March 22, 2005
Case Number: TSO-0210

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter referred to as "the individual") for access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." ¹

I. BACKGROUND

The individual has held a Department of Energy (DOE) security clearance since 1997, when, as a 16 year old high school student, she obtained summer employment with a DOE contractor. After graduating from college, the individual became a full-time employee of the contractor. In 2003, the contractor requested that her security clearance be upgraded. In response to this request, the local security office conducted an investigation of the individual. As part of this investigation, the individual completed a Questionnaire for National Security Positions (QNSP). On this QNSP, she indicated that she used marijuana approximately five times between January 1999 and January 2001 and that she used the drug methylenedioxymethamphetamine (hereinafter referred to as "MDMA") once in March 2002. Because this information raised security concerns, the individual was called in for a Personnel Security Interview (PSI).

Subsequent to this interview, the Manager of the local security office reviewed the individual's file and determined that derogatory information existed that cast into doubt her eligibility for a security clearance. The Manager suspended the individual's clearance and informed her of this determination in a letter that set forth in detail the DOE's security concerns and the reasons for those concerns. I will hereinafter refer to this letter as the Notification Letter. The Notification Letter also informed the individual that she was entitled to a hearing before a Hearing Officer in

¹An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will be referred to in this Decision as access authorization or a security clearance.

order to resolve the substantial doubt concerning her eligibility for access authorization. The individual requested a hearing on this matter. The Manager forwarded this request to the Office of Hearings and Appeals and I was appointed the Hearing Officer.

II. STATEMENT OF DEROGATORY INFORMATION

As indicated above, the Notification Letter included a statement of derogatory information that created a substantial doubt as to the individual's eligibility to hold a clearance. This information pertains to paragraphs (k) and (l) of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710.8. Paragraph (k) refers to information indicating that the individual has "sold, transferred, possessed, used, or experimented with a . . . substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, . . . etc.)" except as prescribed by a physician or otherwise authorized by federal law. As support for this paragraph, the Notification Letter relies on the individual's statements on the QNSP and during the PSI about her use of marijuana and MDMA .

Paragraph (l) pertains to information indicating that the individual "has engaged in any unusual conduct or is subject to any circumstances which tend to show that [she] is not honest, reliable, or trustworthy; or which furnishes reason to believe that [she] may be subject to pressure, coercion, exploitation or duress which may cause [her] to act contrary to the best interests of the national security." 10 C.F.R. § 710.8(l). As a basis for this paragraph, the Letter alleges that during the PSI, the individual stated that she did not know that it was against DOE policy to use illegal drugs while holding a security clearance, even though she admitted having signed a document setting forth that policy in 1997.

III. REGULATORY STANDARDS

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictate that in these proceedings, a Hearing Officer must undertake a careful review of all of the relevant facts and circumstances, and make a "common-sense judgment . . . after consideration of all relevant information." 10 C.F.R. § 710.7(a). I must therefore consider all information, favorable or unfavorable, that has a bearing on the question of whether granting the individual a security clearance would compromise national security concerns. Specifically, the regulations compel me to consider the nature, extent, and seriousness of the individual's conduct; the circumstances surrounding that conduct; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the likelihood of continuation or recurrence of the conduct; and any other relevant and material factors. 10 C.F.R. § 710.7(c).

A DOE administrative proceeding under 10 C.F.R. Part 710 is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization."

10 C.F.R. § 710.21(b)(6). Once the DOE has made a showing of derogatory information raising security concerns, the burden is on the individual to produce evidence sufficient to convince the DOE that restoring access authorization “will not endanger the common defense and security and will be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d). *See Personnel Security Hearing*, Case No. VSO-0013, 24 DOE ¶ 82,752 at 85,511 (1995) (*affirmed* by OSA, 1996), and cases cited therein. For the reasons that follow, I conclude that the individual has made this showing, and that her clearance should therefore be restored.

IV. THE HEARING

At the hearing, the individual attempted to show that the incidents of drug usage were isolated, youthful mistakes and that she is an honest person who takes security requirements seriously and can be trusted to abide by them in the future. In addition to her own testimony, the individual presented the testimony of her former and current supervisors, her friend and her mother.

The individual testified that she used the marijuana in college to relieve the stress associated with taking final exams. Hearing Transcript (Tr.) at 57. Her use of MDMA occurred at a party. “[E]verybody at the party was doing it,” she explained. “They said it is such a wonderful thing, you have to try at least once. So I said, ‘Okay, I will try at least once,’ and I didn’t like it. I don’t like to be out of my state of mind, and it wasn’t something that I would ever do again.” Tr. at 58. Although the individual was aware of the DOE’s policy concerning illegal drug usage while holding a security clearance, Tr. at 64-65, she said that she did not believe that policy applied to her usage of drugs during the school year because “at the end of every summer, I turned in my badge, and I went away, and they tell you that you are not guaranteed a job back. So when I . . . went back to school, I never knew whether or not I was going back [to work for the contractor] . . .” Tr. at 59. She added that during the school year “I wasn’t under the impression that I was still working for [the contractor] or anything, because I turned everything in, and I was in a completely different city.” *Id.* She further indicated that had she been aware that the DOE policy still applied to her, she would not have used the illegal drugs. Tr. at 64. She concluded by saying that she is not the same person as the one who used drugs during her college years because she is now more grown-up and mature. Tr. at 63.

The individual’s mother and the individual’s friend also testified. The individual’s mother said that the individual lives with her and is now more mature than she was during her college days. Tr. at 44, 47. The individual’s friend stated that she has known the individual for approximately 15 years and that they see each other daily away from their respective workplaces. Tr. at 32, 34. Both women testified that they have not seen the individual use illegal drugs, nor have they observed anything that would lead them to believe that the individual was using illegal drugs.

Both also stated that she is honest and of high moral character, and that she now deals with stress by working out. Tr. at 32-52.

Finally, the individual presented the testimony of her current and former supervisors. Both of these witnesses said that the individual is a skilled and conscientious worker who takes security seriously and has never appeared to have been under the influence of illegal drugs while at work. Tr. at 11-31.

V. ANALYSIS

After reviewing the testimony described above and the record in this matter as a whole, I find that the individual has adequately addressed the DOE's security concerns under paragraphs (k) and (l). Paragraph (k) reflects a valid concern that a clearance holder who uses illegal drugs may act in a manner that is inconsistent with the best interests of national security while under the influence of such substances. Also, such use indicates a disturbing willingness to ignore legal requirements that could also be reflected in the clearance holder's attitude toward security requirements. *See, e.g., Personnel Security Hearing*, 28 DOE ¶ 82,816 (2001); *Personnel Security Hearing*, 28 DOE ¶ 82,756 (2000). Accordingly, the individual's past drug usage raises serious concerns about her suitability for access authorization. However, I conclude that there are several substantial mitigating factors in this case. As an initial matter, each instance of drug usage occurred while the individual was between 18 and 21 years of age. Immaturity and impulsiveness can often lead to lapses in good judgement among people in this age category. Second, the testimony produced at the hearing indicates that these usages were isolated in nature. Both the individual's mother, with whom she lives, and the individual's friend, with whom she socializes on a regular basis, testified that they have not witnessed the individual using illegal drugs, nor have they seen any signs of such use. Finally, the individual's circumstances have changed since the period of time during which she was using drugs. These instances occurred while she was a college student, a time of life that often involves experimentation and risk-taking. The individual is now a 25 year old adult who has the responsibilities that are attendant with full-time employment. Given these factors, I am confident that the individual will completely refrain from illegal drug usage in the future.

The DOE's invocation of paragraph (l) in the Notification Letter is based on the allegation that during the 2004 PSI, the individual "stated that she did not know it was against DOE policy to use illegal drugs while holding a DOE clearance." Attachment 2 to Notification Letter (Statement of Charges). "However," the Letter continues, "she acknowledged that she signed the DOE Security Acknowledgment Statement and the DOE Clearance Criteria Statement, which references illegal drug use. . . ." *Id.* The clear implication of the second statement is that the

individual may not have been telling the truth when she allegedly made the first statement. However, at no point during the PSI in question did the individual categorically state that she did not know that it was against DOE policy to use illegal drugs while holding a DOE clearance. What she did clearly indicate was that she did not realize that *her* drug usage was against DOE policy because it occurred during the school year, when, she believed, her clearance and the DOE policy were not in effect. The following excerpts from the PSI will illustrate this point:

Analyst: Okay. All right. But . . . you're not aware that using illegal drugs while holding a DOE security clearance may affect your security clearance?

Individual: I hadn't, I didn't realize that because . . . it wasn't during my time of . . . work and so –

Analyst: But you still had a clearance.

Individual: – I didn't know. Yeah, . . . I didn't realize that it was –

Analyst: Okay.

Individual: – that I still had it.

PSI at 17-18.

Analyst: Okay. But to the best of your ability I think what you're telling me here, and to the best of your recollection you was [sic] not aware that your access was still active –

Individual: Correct.

Analyst: – while you was [sic] in school in [a nearby city].

Individual: Right. Uh-huh.

Analyst: 'Kay. And you did not feel that you was not [sic] in violation of any policy?

Individual: No.

PSI at 36-37. The upshot of all this is that the inconsistency suggested by the Notification Letter in the individual's statements during the PSI does not exist.

However, the fact remains that the individual used illegal drugs while holding a DOE clearance. This circumstance raises legitimate security concerns under paragraph (l) about the individual's honesty, reliability and trustworthiness. As with the concerns under paragraph (k), I find that the individual has adequately addressed any questions about these attributes. First, the individual has consistently stated, both during the PSI and at the hearing, that she did not believe that her clearance remained active during the school year, and that she therefore did not believe that the DOE's policy against drug usage by clearance holders remained in effect. I found her statements at the hearing to this effect to be credible. Second, I also found credible the uncontradicted

testimony at the hearing that the individual is an honest person who takes the requirements of security seriously. Finally, I note that it is the individual herself whose honest responses on her QNSP provided the information that led to the institution of these proceedings. Given these factors, I am confident that the individual can be trusted to provide accurate information to DOE security and to conform to other security requirements.

VI. CONCLUSION

For the reasons set forth above, I find that the individual has adequately addressed the DOE's security concerns under paragraphs (k) and (l). I therefore conclude that restoring her clearance would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, the individual's security clearance should be restored. The Office of Safeguards and Security may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Robert B. Palmer
Hearing Officer
Office of Hearings and Appeals

Date: **August 4, 2005**